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COMPETITION

Three cartel cases lost by the competition commission before the competition tribunal – what are the implications for future cases?

5 February 2020 *5 min read*

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1. In the last two months the Competition Commission has lost three cartel cases before the Competition Tribunal.
2. On 4 December 2019, the Tribunal dismissed a case of indirect price fixing and market division brought by the Commission against Natal Portland Cement Cimpor ("**NPC**"). NPC's shareholders had been Pretoria Portland Cement Company ("**PPC**"), Lafarge Industry South Africa ("**Lafarge**") and AfriSam Consortium ("**AfriSam**"). PPC, Lafarge and AfriSam admitted to being part of a cartel. PPC was granted leniency and thereby avoided penalties. AfriSam and Lafarge settled with the Commission paying penalties of R124 878 870 and R148 724 400 respectively. The Tribunal found that the Commission had failed to prove that NPC was party to the cartel arrangements between its shareholders.
3. On 20 December 2019, the Tribunal dismissed a case brought by the Commission against eleven furniture removal truck companies (including Stuttaford Van Lines, and Pickfords Removals) for allegedly fixing prices by agreeing to charge a R350 levy to customers to recover Gauteng e-toll levies at a meeting in January 2014 under the auspices of the Northern Province Professional Movers Association (a trade association). On the facts, the Tribunal found that there was sufficient proof of an agreement to fix prices. However the meeting had taken place more than three years before the Commission's complaint was initiated in February 2017. In terms of section 67(1) of the Competition Act, a complaint in respect of a prohibited practice may not be initiated by the Commission more than three years after the practice ceases. The Commission was unable to prove that the agreement had been implemented during the three year period before it initiated its complaint and the Tribunal found that section 67(1) applied in favour of the respondents. Interestingly, three of the companies (Crown Relocations, A&B Movers and Key Moves) had previously admitted liability and settled with the Commission by paying penalties of R240 647.05, R208 121.90 and R438 312.80 respectively.
4. On 15 January 2020, the Tribunal dismissed a price fixing and collusive tendering case against Tourvest Holdings and Trigon Travel relating to a Government tender for services relating to domestic airplane flight tickets and accommodation for members of Parliament. The Commission conceded that it had no direct evidence of collusion between the firms and based its case on drawing inferences from the similarity in the bids (the bid price and B-BBEE status in each bid was identical and the bids were submitted on the same day) and the existing commercial relationship between the two firms through a buying group with suppliers of travel services. The Tribunal dismissed the case on the basis that the Commission had not discharged its onus of proof.
5. The three cases are instructive in that –
    - They support a trend whereby firms are increasingly opposing cases brought against them by the Commission. In the past, the Commission has primarily relied on leniency applications and settlement agreements to prosecute cartels. More recently, the Commission has increasingly taken action against firms that do not settle with it. The criminalisation of cartel conduct since 1 May 2016 may be a partial explanation for this trend. The directors and managers of a successful leniency applicant or a firm which settles with the Commission are not guaranteed immunity from personal criminal prosecution. Reputational damage and the risk of civil damages claims must also be taken into

account before a firm decides to apply for leniency or settle with the Commission. A careful and thorough analysis of the facts as well as the strength and weaknesses of available defences is vital.

- The cases indicate that the “checks and balances” in the structure of the competition authorities in terms of the Competition Act is functioning effectively and fairly. The Tribunal is acting independently and holding the Commission accountable to prove its cases on the facts. Drawing inferences is not sufficient. In future the Commission may be more circumspect in assessing which cases it brings before the Tribunal particularly given the costs, resources and time involved in opposed Competition Tribunal referrals.
- The three furniture removal companies which admitted liability and settled with the Commission may be suffering from “early settlement remorse”. However the costs and complexity of competition litigation and the difficulty of predicting a successful outcome is often a disincentive for especially smaller and medium sized firms to oppose the Commission before the Tribunal, resulting in them preferring settlements. However admitting to cartel conduct (which is now a criminal offence) has serious reputational implications and may result in civil damages claims and the criminal prosecution of directors and managers. The commercial benefits of an early settlement need to be weighed against these factors especially if a defence is available. Again a thorough analysis of the facts is necessary before a leniency application or settlement is made.
- It is interesting that the Commission lost the NPC and furniture removal cases even though firms involved in the conduct had admitted liability in terms of a leniency application and settlement agreements. These firms would have been obliged to fully cooperate with the Commission in its prosecution of the cases. The fact that the Commission was unsuccessful indicates that the Commission's reliance on such firms is not necessarily a decisive factor favouring a Commission “win”.

6. The contestation by firms of cases brought against them by the Commission is to be welcomed as it helps to develop the case law and set precedents which assists firms (and their advisors) to regulate their future conduct. Of course the Commission has the right to appeal against the Tribunal decisions to the Competition Appeal Court. Any such appeal would however have to be carefully considered having regard to the Tribunal's findings on the facts.



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